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NO. 64419-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EDWARD CASTILLO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE REMEDY FOR VIOLATION OF CASTILLO'S PUBLIC TRIAL RIGHT IS REVERSAL BECAUSE CASTILLO DID NOT AFFIRMATIVELY WAIVE HIS RIGHTS AND THE COURT DID NOT ACKNOWLEDGE HIS RIGHTS OR BALANCE THE CONSTITUTIONAL INTERESTS AT STAKE.

The State concedes Castillo's constitutional right to a public trial was violated. Brief of Respondent at 6. The only question here is the proper remedy under the Washington Supreme Court's decisions in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). That remedy is reversal because this case differs from Momah in two crucial respects. First, there was no affirmative waiver of the public trial right because the proposal for in-chambers voir dire came from the court, not from defense counsel. Second, the record does not clearly show the court acknowledged Castillo's public trial right or performed any Bone-Club¹-like balancing of constitutional interests.

- a. In Reiterating the Court's Offer to Question Jurors in Chambers, Defense Counsel Did Not Waive Castillo's Right to a Public Trial.

Castillo did not affirmatively waive his right to a public trial because he neither proposed in-chambers voir dire initially, nor did he argue for its expansion as in Momah. On the contrary, defense counsel merely reiterated the court's offer to question jurors privately. 1RP 95. In Momah, the written

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

questionnaire identified jurors who might have prior information about the case, could not be fair, or requested private questioning. 167 Wn.2d at 145-46. The parties agreed that those jurors would be questioned in chambers. Id. After joining the initial proposal, defense counsel in Momah argued to the court that not only those identified jurors, but “everybody” should be questioned privately about their prior knowledge. Id. at 146.

By contrast, defense counsel in this case engaged in no such aggressive pursuit of increased questioning in chambers. The court had already announced that anyone who wanted to be questioned privately would be given that opportunity. RP 8-9. Because the court had already announced the private questioning, there was no evidence counsel was making a “tactical choice,” as the court found in Momah. 167 Wn.2d at 155. Defense counsel merely reiterated the court’s previous offer and went along with the court’s plan. RP 95.

This case is more like State v. Bowen, ___ Wn. App. ___, ___ P.3d ___ (no. 39096-5-II, filed July 20, 2010), in which the court reversed for violation of the public trial right. The Bowen court carefully considered Momah and Strode and reversed Bowen’s conviction in part because “the trial court, not defense counsel, proposed individual in-chambers voir dire of jury pool members.” Bowen, slip op. at 8. As in Bowen, this Court should conclude Castillo did not waive his right to a public trial and reverse.

b. The Court Failed to Engage in Any Bone-Club-Equivalent Balancing of Constitutional Interests.

In Momah, the court declined to reverse the conviction because the court “recognized the competing article I, section 22 interests” and “carefully considered” Momah’s rights and various proposals for voir dire. Momah, 167 Wn.2d at 156. Specifically, in that case the prosecutor noted that Washington case law required the jury selection be open to the public. Strode, 167 Wn.2d at 233 (Fairhurst, J., concurring). The court agreed and added that court rules also presume all proceedings are open to the public. Strode, 167 Wn.2d at 233 (Fairhurst, J. concurring).

This case is more like the prior cases the court contrasted in Momah, where the record contained no indication the court was even aware of the defendant’s constitutional right to a public trial when it decided to close a portion of the proceedings. 167 Wn.2d at 151-52. The record contains no indication in this case that the court was aware of the constitutional rights at issue when it questioned potential jurors in chambers. Neither the court nor the prosecutor mentioned the right to a public trial or considered alternatives to questioning jurors in chambers. 1RP 8-105.

Justice Fairhurst, author of the majority opinion in Momah, explained her concurrence with the Strode lead opinion (reversing Strode’s conviction) by noting that in Strode, the court did not weigh the right to

public trial against competing interests. 167 Wn.2d at 232, 235. That crucial element was also missing in this case. The mere fact that the court paused to see if there was an objection does not amount to the “safeguarding” of Castillo’s right to public trial. Strode, 167 Wn.2d at 232, 235.

Important to the Momah decision was also the same factor discussed in State v. Paumier, 155 Wn. App. 673, 683, 230 P.3d 212 (2010) and Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 2d ___ (2010): whether the court considered reasonable alternatives before closing the courtroom. Momah, 167 Wn.2d at 155. In explaining why reversal was not required, the Momah court specifically noted that “Before in-chambers voir dire began, defense counsel, the prosecution, and the judge discussed numerous proposals concerning the juror selection.” Id. In Castillo’s case, no other proposals were discussed. The court merely announced from the outset that jurors could be questioned in chambers if they requested. 1RP 8-9.

The State’s argument regarding the Presley decision, relied on in Paumier, is partially correct. Brief of Respondent at 13-14. Under Presley, the public trial right may, under some circumstances, give way to other important constitutional concerns. 130 S. Ct. at 724. However, the State neglects to cite the very next sentence of the opinion. Quoting Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), the court

explained, “Such circumstances will be *rare*, however, and the balance of interests must be struck with *special care*.” 130 S. Ct. at 724 (emphasis added). The reason for the closure must be articulated clearly enough for a reviewing court to determine whether the closure was properly ordered. *Id.* at 725.

The facts of Castillo’s case are hardly rare. Cases requiring that jurors divulge sensitive personal experiences with sexual abuse are, unfortunately, all too common. Nor did the court take “special care” to balance competing interests on the record so that a reviewing court could determine whether the closure was properly ordered. Moreover, Justice Thomas, writing in dissent, interpreted the Presley majority as requiring courts to *sua sponte* consider reasonable alternatives before excluding the public from voir dire. 135 S. Ct. at 727 (Thomas, J., dissenting) (“[T]he Court may well be right that a trial court violates the Sixth Amendment if it closes the courtroom without *sua sponte* considering reasonable alternatives to closure.”). This, the court clearly did not do in Castillo’s case.

A reviewing court should “look to the record to see if the trial court employed some equivalent of Bone-Club.” Paumier, 155 Wn. App. at 683 (harmonizing Momah and Strode). If no Bone-Club analysis or its equivalent occurred, the remedy is reversal. *Id.* In Castillo’s case, the court failed to engage in any Bone-Club-equivalent balancing of interests. Nor did

Castillo engage in the type of aggressive, affirmative conduct that constituted waiver of the right to public trial in Momah. Because his right to a public trial was violated by holding a portion of voir dire in chambers, Castillo's conviction should be reversed.

2. KITCHEN'S TESTIMONY WAS CRUCIAL TO ESTABLISHING THE COMPLAINING WITNESS'S MOTIVE TO LIE.

"Where the credibility of the complaining witness is crucial, her possible motive to lie is not a collateral issue." State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). Lubers does not support the State's argument, or the court's conclusion, that Kitchen's testimony was collateral. In Lubers, the defense sought to present evidence of a feud involving not the defendant, but his girlfriend, and not the complaining victim, but her cousins. 81 Wn. App. at 618. There was no offer of proof that either the defendant or the complaining victim was involved. Id. Nor was there any evidence that the cousins or the girlfriend were in any way involved in the rape at issue. Id. Thus, the court concluded any motive to lie arising from this feud would be wholly speculative. Id. at 623.

In stark contrast to Lubers, the motive to lie in this case arose out of a dispute between Castillo himself and his former girlfriend Stutzman, who was not only the aunt of the complaining witness, but was present the night the offense supposedly occurred and thus was a crucial witness. 3RP 152-

67; 4RP 286-87. The motive to lie arising out of this dispute was concrete and directly related to the complaining witness's motive to fabricate. Her credibility was crucial and thus, Kitchen's testimony was not collateral. Lubers, 81 Wn. App. at 623. Her ability to corroborate Castillo's testimony on this matter was essential to Castillo's defense and the court erred in excluding it.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, this Court should reverse Castillo's conviction.

DATED this 11th day of August, 2010.

Respectfully submitted,

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v.)	COA NO. 64419-0-1
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EDWARD CASTILLO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF AUGUST 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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[X] EDWARD CASTILLO
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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF AUGUST, 2010.

x *Patrick Mayovsky*